Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

October Term, 1993

GEORGE FITZPATRICK and HEZA FITZPATRICK,
Petitioners,

vs.

JACK MACKEY and SGT. LEE MEYER,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether there is a violation of the Fourth and Fourteenth Amendments of the United States Constitution when a deputy sheriff and the superintendent of a county agency, without the benefit of a subpoena, a warrant or exigent circumstances, order personal and business records to be withheld from the citizens who own those records.

2. Whether a deputy sheriff and the superintendent of a county agency are entitled to qualified immunity from liability in §§1983 and 1984 civil actions for freezing the records of a group home for the mentally retarded.

LIST OF PARTIES

The parties to the proceedings below were the Petitioners George Fitzpatrick and Heza Fitzpatrick, Respondent Sgt. Lee Meyer, Deputy Sheriff of the Brown County, Ohio Sheriff's Department (in both his individual and official capacities) and Respondent Jack Mackey, Superintendent of the Brown County, Ohio Department of Mental Retardation and Developmental Disabilities (in both his individual and official capacities).

Todd Cribett, the Brown County Board of Mental Retardation and Developmental Disabilities, and the Brown County Sheriff were all nominally parties in the Sixth Circuit Court of Appeals. Since the Opinion of the Sixth Circuit did not involve them, they are not named as parties herein.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

The Petitioners George Fitzpatrick and Heza Fitzpatrick respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled proceeding on September 14, 1993.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit vacating the orders that denied Respondents qualified immunity and remanding with instructions to enter summary judgment for Respondents has not been reported. It is reprinted in the appendix hereto at pp. A1-A8.

The Orders and Judgments of the United States District Court for the Southern District of Ohio, Western Division (Rubin, *D.J.*) denying summary judgment on the basis of qualified immunity for Respondents Sgt. Lee Meyer and Jack Mackey have not been reported. They are reprinted in the appendix hereto at pp. A9-A37.

The Order of the United States Court of Appeals for the Sixth Circuit denying a timely Petition for Rehearing and Suggestion for Rehearing *En Banc* has not been reported. It is reprinted in the appendix hereto at pp. A38-A39.

JURISDICTION

The Opinion of the United States Court of Appeals for the Sixth Circuit, entered on September 14, 1993, vacated the orders of the U.S. District Court for the Southern District of Ohio, Western Division denying Respondents Mackey and Meyer qualified immunity and remanded with instructions to enter summary judgment for those Respondents. The United States Court of Appeals for the Sixth Circuit denied Petitioners' timely Petition for Rehearing and Suggestion for Rehearing *En Banc* on November 5, 1993. The jurisdiction of this Court to review the judgment of the Sixth Circuit is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. Amend. IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. XIV, section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioners George Fitzpatrick and Heza Fitzpatrick invoked the jurisdiction of the District Court under the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States, 42 U.S.C. §1983 (civil action for the deprivation of civil rights), 42 U.S.C. §1985 (conspiracy to interfere with civil rights), 28 U.S.C. §1343 (original jurisdiction of the district courts for civil rights violations and for conspiracy to violate civil rights), and 28 U.S.C. §1331 (general federal question). The amount in controversy for each Petitioner exceeded $10,000, exclusive of interest or costs.

Petitioners George Fitzpatrick and Heza Fitzpatrick (hereinafter "Mr. Fitzpatrick," "Mrs. Fitzpatrick," or, collectively, "the Fitzpatricks") operated three group homes for the mentally retarded in Williamsburg, Brown County, Ohio. The Brown County Department of Mental Retardation and Developmental Disabilities (hereinafter "Brown County MRDD"), according to Ohio law, is charged with the responsibility of monitoring the delivery of services to mentally retarded individuals in Brown County. Respondent Jack Mackey was the superintendent of the Brown County MRDD. Respondent Sgt. Lee Meyer, a veteran police officer and former police chief, was a deputy sheriff with the Brown County, Ohio Sheriff's Department.

For one to two weeks prior to November 9, 1990, the Brown County MRDD and its superintendent, Respondent Mackey, had received allegations of abuse concerning a resident of one of the Fitzpatrick group homes (Mackey Deposition at 34). No one at any time suspected the Fitzpatricks of being involved, or of being parties to, the abuse (which related to a reported rape of a resident). All of the allegations, however, were

eventually dismissed. (Mackey deposition at 61). On November 9, 1990, Respondent Mackey discussed with Respondent Sgt. Lee Meyer these reports, and the men agreed to investigate.

The Fitzpatrick group home (hereinafter "Group Home") maintained on its premises records necessary for, among other things, the delivery of care to all of the residents (hereinafter "Records"). Respondent Mackey initiated an idea to freeze the Records during the course of the investigation. (Mackey deposition at 20). Thereafter, Respondent Mackey ordered Respondent Meyer that the "records should be frozen." (Mackey deposition at 19). Respondent Mackey also instructed Respondent Meyer to tell Mr. Fitzpatrick that "my people will be in his home tonight and his records are frozen." (Meyer deposition at 11).

After speaking with Respondent Meyer, Respondent Mackey called Mr. Fitzpatrick to tell Mr. Fitzpatrick that the "sheriff is coming to freeze your Records." (Fitzpatrick deposition at 65). Subsequently, Respondent Meyer, dressed in a standard sheriff's uniform and armed with a 9mm service weapon, drove to the Group Home in a marked sheriff's cruiser. (Meyer deposition at 12). Upon arriving at the Group Home, Respondent Meyer told Mr. Fitzpatrick that, "I am a deputy sheriff and I have orders to freeze your Records," and "you just can't have access to them." (Fitzpatrick deposition at 65, 67). Following the visit by Respondent Meyer to the Group Home, and under the orders of Respondent Mackey, Todd Cribett, a case manager with the Brown County MRDD, and Theresa Holbrook, a case worker with the Brown County Department of Human Services, went to the Group Home and told Mr. Fitzpatrick that

all of the Records at the Group Home were frozen to Mr. Fitzpatrick. (Fitzpatrick deposition at 72, Cribett deposition at 25).

At no time did Respondent Mackey seek legal advice concerning the freezing. (Mackey deposition at 30). Although Respondent Mackey had not frozen any records previously, he stated that "this was something I had heard of being done." (Mackey deposition at 20). By freezing the Records, Respondent Mackey meant that "nothing should go in the Records beyond that point or out of the Records." (Mackey deposition at 19). Similarly, Respondent Meyer did not question Respondent Mackey's authority to freeze the Records. (Meyer deposition at 11). Respondent Meyer also failed to inquire of his supervisor, Detective Sgt. Buddy Coburn, or Respondent Mackey whether to take a subpoena or search warrant to freeze the Records at the Group Home. (Meyer deposition at 14).

After the freezing, the Fitzpatricks did not have access to the Records until November 20, 1990. At all times between November 9 and November 20, 1990, Mr. Fitzpatrick understood that the Records were frozen to him. (Fitzpatrick deposition at 59, 87-88, 167, 172). In the interim, Mr. Fitzpatrick made numerous attempts to gain access to the Records.

On November 20, 1993, Mr. Fitzpatrick received two letters concerning the freezing of the Records. In one, Respondent Meyer stated that he "learned that Mr. mackey (sic) did not have the authority to freeze the said records. This is to advised (sic) Mr. Fitzpatrick that his Records are not frozen, that Mr. mackey (sic) did not have the authority to freeze them." (Meyer deposition, Plaintiff's deposition Exhibit 1). On the same date to Mr. Fitzpatrick, Respondent Mackey wrote, "I realize

that you need to access your records to operate and therefore am writing this letter as you requested. I have no power to freeze records." (Mackey deposition, Plaintiff's Exhibit 2).

The Fitzpatricks filed suit to recover damages from Respondents Meyer and Mackey for violations, under color of law, of the Fitzpatricks' rights to be free from unreasonable searches and seizures pursuant to the Fourth and Fourteenth Amendments of the United States Constitution. The Petitioners also alleged causes of action for violations of the Fifth Amendment of the Constitution of the United States as well as claims under 28 U.S.C. §§1983 and 1985 for violations of civil rights and conspiracies to violate civil rights.

The Fitzpatricks' allegations followed a three-fold theory. The freezing of the Records caused the Fitzpatricks to lose access to the Records and inhibited proper delivery of care to the residents of the Group Home. Second, the Fitzpatricks alleged the freezing to be an unlawful seizure of the Records, violating the constitutional rights of the Fitzpatricks. Finally, the Fitzpatricks maintained that Respondents are not entitled to qualified immunity because Respondents violated clearly established constitutional rights.

On October 13, 1992, Judge Carl B. Rubin of the United States District Court for the Southern District of Ohio, Western Division denied Respondent Meyer summary judgment, finding issues of material fact for qualified immunity, substantive due process, damages and subject matter jurisdiction. On December 12, 1992, from an order dated December 10, 1992, Judge Rubin denied summary judgment to Respondent Mackey on the same basis. On September 14, 1993, the United States

Court of Appeals for the Sixth Circuit vacated the orders denying Respondents Meyer and Mackey qualified immunity and remanded with instructions to enter summary judgment in favor of Respondents. After a timely petition by the Fitzpatricks, the United States Court of Appeals for the Sixth Circuit denied a Petition for Rehearing and Suggestion for Rehearing on *En Banc* on November 5, 1993.

In his opinion, Judge Rubin found that "[g]overnment officials performing discretionary functions are accorded qualified immunity from liability for civil damages provided that their actions 'could reasonably have been thought consistent with the rights they are alleged to have violated.' *Anderson v. Creighton*, 483 U.S. 635, 638 (1987); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)." (See Appendix p. A19). Judge Rubin found that qualified immunity rested on objective legal reasonableness evaluated in light of clearly established legal rules. (See Appendix p. A19). In ruling on the summary judgment motion of Respondent Mackey, Judge Rubin determined "that genuine issues of material fact exist as to whether Mackey directed Meyer to seize the Records and whether Mackey directed Meyer to do so under the guise of Mackey's authority." (See Appendix pp. A22-A23). "[R]easonable officials in the position of Mackey should have known that the conduct at issue was undertaken in violation of the right to be free from unreasonable seizures." (See Appendix p. A23). In a separate opinion, Judge Rubin found that "a reasonable officer in the position of Meyer could not have reasonably believed that freezing the records would not violate the right to be free from unreasonable seizures." (See Appendix p. A31).

In reversing, the United States Court of Appeals for the Sixth Circuit agreed with the standard which the District Court used to define qualified immunity. (See Appendix p. A6). The Sixth Circuit first looked to see where there was a clearly established right that had been violated, then found that "Meyer's message to the Fitzpatricks is not a seizure under the Fourth Amendment." (See Appendix p. A7). In ruling for Respondent Mackey, the Sixth Circuit also found that "[b]ecause we have concluded that Meyer did not violate the Fitzpatricks' rights when he delivered Mackey's message to the Fitzpatricks, it follows that Mackey is also entitled to qualified immunity." (See Appendix p. A7). The Court of Appeals declined to rule whether or not a reasonable state official in the position of either Meyer or Mackey should have known that the actions would constitute a violation of the Fitzpatricks' constitutional rights.

REASONS FOR GRANTING THE WRIT

I. Because the Sixth Circuit did not find that restricting access to property is equivalent to the physical movement of property, citizens cannot be secure in their personal effects without this Court resolving important Fourth Amendment issues.

To close loopholes which literalists of the law create from opinions of this Court, this Court can expound on circumstances which demonstrate the unreasonable seizure of property. A ruling that the freezing of Records violates the Fourth Amendment would dispel a dark cloud of uncertainty and permit citizens to be secure in their person and property. The issues which the Fitzpatricks are petitioning this Court to review are vital to preventing the repetition of Fourth Amendment violations.

The instant petition brings before this Court a situation which Respondents would prefer to characterize as "business as usual." Because the freezing of the Records in the case at bar is identical to the physical seizure of personal property by the government, this Court should use the instant Writ of Certiorari to guide the activities of the police and preserve the fundamental rights of citizens.

As this Court has clearly held, " '[s]eizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). After outlining the definition, however, this Court recognized that "[w]hile the concept of 'seizure' of property is not much discussed in our cases, this definition follows from our oft-repeated definition of the 'seizure' of a person within the meaning of the Fourth

Amendment—meaningful interference, however brief, with an individual's freedom of movement." *Id.* at 113 n.5. Because there is relatively little instruction on the concept of the seizure of property, this Court can explicitly extend the analogy of seizure of the person to the freezing of the Records in the case at bar.

The analogy to the seizure of a person naturally encompasses the seizure of the Records. "The test provides that the police can be said to have seized an individual 'only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.' " *Michigan v. Chesternut*, 486 U.S. 567, 573 (1988) (*quoting United States v. Mendenhall*, 446 U.S. 544, 554 (1980)). The Court "has since embraced this test." *Id.* (*citing INS v. Delgado*, 466 U.S. 210, 215 (1984)). By freezing the Records, Respondents not only violated the letter of the law, but they also violated the spirit of the law. The Fitzpatricks may be two small victims in the case at bar, but the number of future victims is unlimited.

Ohio regulations for the operation of group homes for the mentally retarded provide that "records must be available for licensure review and for review by other representatives of the department [of Mental Retardation and Developmental Disabilities]." Ohio Admin. Code §5123:2-3-16(B). This state agency's right to review records does not equate with the right to exercise dominion over those records. Thus, Respondents had no statutory or regulatory basis for freezing the Records and denying the owners of those records access to them.

The refusal by Respondents to permit the Fitzpatricks to access the Group Home Records meaningfully interfered with the possessory interests in the Records. Furthermore, after direct instructions from

the superintendent of a regulatory agency, orders from an officer of the law, and statements from county case workers, the Fitzpatricks felt that they were not free to use their Records and did not use those Records until advised by the government officials that such access was then permitted.

The Fitzpatricks are not necessarily asking this Court to equate the mere words "Your Records are frozen" with an unreasonable seizure. Rather, that statement must be evaluated in light of all the circumstances of this case.

> "The test is necessarily imprecise, because it is designed to assess the coercive effect of police conduct, taken as a whole, rather than focus on particular details of that conduct in isolation. Moreover, what constitutes a restraint on liberty prompting a person to conclude that he is not free to 'leave' will vary, not only with the particular conduct at issue but also with the setting in which the conduct occurs." *Chesternut*, 486 U.S. at 573.

Accordingly, this Court must assure that the totality of the circumstances facing citizens enters into the equation of Fourth Amendment violations. Otherwise, innocent citizens such as the Fitzpatricks will fall prey to literalists of the law.

II. By acknowledging that the freezing of the Records constituted a Fourth Amendment seizure, this Court can simultaneously discourage individual interpretation of the law.

At the beginning of the investigation of the Group Home, Respondent Mackey, with the support of Respondent Meyer, froze the Records of the Group Home. Both Respondents invoked the full authority of the law to enforce their action.

Mr. Fitzpatrick, after a telephone call from Respondent Mackey, arrived at the Group Home expecting that the Records would be frozen. Respondent Meyer approached Mr. Fitzpatrick in a full sheriff's uniform, in a clearly marked cruiser, and with a 9mm service weapon at his side. In the face of such authority, Mr. Fitzpatrick quite reasonably submitted to the authority manifested in Respondent Meyer. Although the Sixth Circuit found that Respondent Meyer had merely conveyed a message, the circumstances which Mr. Fitzpatrick faced were much more awesome. From the perspective of a reasonable person, if a deputy sheriff wanted simply to convey a message, a simple call or note would have sufficed. To someone not in the habit of entertaining official visitors, the physical presence of Respondent Meyer symbolized the power of the State compelling the Fitzpatricks to refrain from accessing their Records. At the Group Home on November 9, 1990, a seizure of the Records unquestionably took place.

Should the entire United States follow the rationale of the court below, bizarre circumstances would result. Logically, citizens would be entitled to question, and even disobey, the power and actions of a police officer to arrest a wrongdoer. Citizens could freely resist and disobey subpoenas. Citizens could even decide to disobey

a police officer directing traffic in the belief that the officer was merely conveying a message and not enforcing the law.

Nevertheless, with the complex problems in society today, obedience to the verbal order of law enforcement officials needs to be encouraged and should be the norm. Inseparable from such obedience, moreover, is the duty of law enforcement officials to exercise police powers in a manner which respects people's rights to be "secure in their persons, houses, papers, and effects." U.S. Const. amend. IV. The Fitzpatricks were not suspects with regard to any criminal violation. They were, and remain, innocent citizens.

If the Fitzpatricks had treated Respondent Meyer's visit as a mere message, and had chosen to ignore it, they would have earned little sympathy from the courts. Indeed, the Fitzpatricks could have faced prosecution for obstruction of justice or a host of other criminal violations resulting from disobedience to a law enforcement officer.

The absurdity of the alternatives to equating the freezing with a seizure reveals that the Fitzpatricks are not the only victims. If the government can seize property with impunity, individuals will become insecure in their personal effects, directly in conflict with the intentions of the authors of the Bill of Rights. In essence, requiring individuals to decide when and if they must obey the commands of the police will lead to confusion at best and anarchy at worst.

III. To consistently apply the Fourth Amendment definition of unreasonable seizure to both person and property, the freezing of the Records should be a seizure.

In determining whether or not a person has been seized by the government in violation of the Fourth Amendment, this Court has held that, "the appropriate inquiry is whether a reasonable person would feel free to decline the officers' request or otherwise terminate the encounter." *Florida v. Bostick*, 111 S. Ct. 2382, 2387 (1991). Such a holding by this Court "breaks no new ground." *Id.* Although Respondents in the case at bar are county officials, the Fitzpatricks and other citizens of Brown County, Ohio should not have to fear the trampling of constitutional liberties. The Fourth Amendment has been applied to the States by the Fourteenth Amendment. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961). Furthermore, "seizures of property are subject to Fourth Amendment scrutiny even though no search within the meaning of the Amendment has taken place." *Soldal v. Cook County, Illinois*, 113 S. Ct. 538, 547 (1992). "It is the extent of the interference with [a person's] possessory interest in his property, not the physical movement of the property, that determines whether a seizure has occurred." *United States v. England*, 971 F.2d 419, 420 (9th Cir. 1992).

No physical movement of the Records is necessary to constitute a seizure. In the face of the show of lawful authority by Respondent Meyer, Mr. Fitzpatrick reasonably obeyed and allowed the Records to be frozen. Because an officer of the law froze the Records, Mr. Fitapatrick felt that he was not free to decline or otherwise terminate the encounter with Respondent Meyer.

If the investigation in the case at bar had been a standard criminal investigation, no police officer or investigating official would have considered seizing any items from a business or residence without first obtaining a warrant. A police officer's use of authority over chattels is identical to a police officer's use of authority over a person. Moreover, an administrative agency's request to a law enforcement agency to freeze documents as in the case at bar must be met with a refusal by the police unless and until either proper procedures are followed or a determination is made that exigent circumstances are present. In short, the potential reach of the Sixth Circuit's decision does too much harm to the rights and privileges of citizenship in the United States.

By ruling that no seizure occurred, the Sixth Circuit conflicts with *Bostick*. In order for this Court to resolve that conflict, and to apply the Fourth Amendment evenly both to person and to property, this Court should grant the instant Writ of Certiorari.

IV. Because the freezing of the Records was clearly established as a Fourth Amendment violation, the extension of qualified immunity in the case at bar is inappropriate.

This Court has clearly set forth the standard for qualified immunity. "Whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action, assessed in light of the legal rules that were 'clearly established' at the time [the action] was taken." *Anderson v. Creighton*, 483 U.S. 635, 638 (1987) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982)). A right is clearly established if "[t]he contours of the right . . . [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson*, 483 U.S. at 640. In light of this standard, the finding of qualified immunity by the lower court conflicts with this Court's decisions.

The right of the Fitzpatricks to be secure in their personal effects is clearly established by the Fourth Amendment of the United States Constitution. Moreover, both Respondents were aware of the illegality of their actions. On November 20, 1990, both of the Respondents wrote to Mr. Fitzpatrick admitting that they were without the legal authority to freeze the Records.

Even if Respondents had not written their letters, however, reasonable officials should have known that a violation was imminent. Respondent Mackey did not seek legal advice before ordering Respondent Meyer to freeze the Records. Respondent Meyer, uncharacteristic of a veteran police officer, did not question Respondent Mackey's authority to freeze the Records and did not

inquire as to whether a subpoena or warrant was necessary. A simple inquiry by either or both Respondents would have led a reasonable official to discover that a right was being violated. The finding that there was qualified immunity for the Respondents in the case at bar clearly conflicts with this Court's decisions.

This Court has acknowledged the "purpose of providing 'clear and unequivocal guidelines' to the law enforcement profession." *Arizona v. Roberson*, 486 U.S. 675, 682 (1988). Thus, in order for persons in the position of the Fitzpatricks to be secure in their rights and for government officials to respect those rights, this Court should grant the instant Writ of Certiorari.

The Sixth Circuit's remand and order of summary judgment in favor of Respondents was an inappropriate determination which requires the intervention of this Court. The Sixth Circuit explicitly stated that there is no authority which addresses the instant case. (See Appendix p. A7). Moreover, the Sixth Circuit found that the actions of Respondent Meyer did not constitute a seizure and, therefore, the actions of Respondent Mackey could not constitute a seizure, either. This is clearly a *non sequitur*. Even if Respondent Meyer's action was not a seizure, he carried out the orders of Respondent Mackey. The Sixth Circuit did not address Respondent Mackey's actions at all, and thus its decision was in error.

Furthermore, summary judgment, pursuant to Fed. R. Civ. P. 56, is appropriate only when reasonable minds, after viewing the evidence in a light most strongly in favor of the party opposing the movant, can only conclude that the movant should prevail. In the case at bar, the evidence clearly showed that the freezing of the Records was a seizure and that government officials

should have realized the violation. The reason behind the lower court's error was, in part, the dearth of authority pertaining to the seizure of personal property. Respondents should have known that the freezing of the Records constituted a seizure. Lower tribunals, however, are unwilling to condemn actions of government officials without guidance from this Court. The case at bar is an appropriate avenue for this Court to define and refine the standards of unreasonable seizure of property in violation of the Fourth Amendment. Hence, to resolve the conflict with traditional definitions of summary judgment, this Court should intervene and grant the Writ of Certiorari.

CONCLUSION

For these various reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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January 31, 1994

APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed September 14, 1993)

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Sixth Circuit Rule 24 limits citation in specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.

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Nos. 92-4159; 93-3033

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GEORGE FITZPATRICK, HEZA FITZPATRICK,
Plaintiffs-Appellees,

v.

LEE MEYER, BROWN COUNTY SHERIFF,
Defendants,

TODD CRIBETT, JACK MACKEY, BROWN COUNTY BOARD OF MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES.
Defendants-Appellants.

On Appeal from the United States District Court for the Southern District of Ohio

Before: MILBURN, RYAN, and BATCHELDER, *Circuit Judges.*

RYAN, *Circuit Judge.* This case involves consolidated appeals from two summary judgment orders entered in plaintiffs' 42 U.S.C. §§1983 and 1985 action. George and Heza Fitzpatrick filed suit against the defendants for their respective roles in allegedly seizing plaintiffs' business documents without a warrant. Both defendant Sgt. Lee Meyer, a deputy sheriff, and Jack Mackey, superintendent of the Brown County Board of Mental Retardation, appeal the district court's summary judgment orders denying them qualified immunity from suit for their role in the alleged seizure of the documents.

The issue is whether the district court erred when it determined that Meyer and Mackey were not entitled to qualified immunity.

We conclude that the district court erred when it determined that Meyer and Mackey were not entitled to qualified immunity. Therefore, we shall vacate the district court's orders and remand with instructions to enter judgment in favor of defendants.

I.

George and Heza Fitzpatrick operated three group homes for the mentally retarded in Williamsburg, Ohio. In the fall of 1990, the superintendent of the Brown County Board .of Mental Retardation, John Mackey, received reports of abuse and neglect occurring at the Fitzpatrick homes, including a report that a resident had been raped at one group home. Mackey notifed the State Mental Retardation and Mental Disabilities Department (MRDD), the Sheriff's Department, the Brown County Human Services Department, and Mr. Fitzpatrick about the reports. Mackey, the Human Services Department, and the Sheriff's Department decided to investigate the homes. In a telephone conversation on November 9,

Mackey instructed Sgt. Meyer to tell Fitzpatrick that their business records would be "frozen."[1] Meyer did not inquire as to whether a warrant or a court order had been obtained authorizing a "freeze" of the records. Mackey also directed Todd Cribett, an MRDD investigator, to investigate the Fitzpatricks' group homes, while the Human Services Department assigned Teresa Holbrook, a Social Services worker, to the case. According to Mackey, he "probably" told Cribett that Cribett should inform the Fitzpatricks that the records were considered frozen. He claims that he did not tell Cribett to take custody of the records.

According to Mr. Fitzpatrick's deposition testimony, Mackey telephoned him on November 9, 1990, and said, " 'George, you better get to your office because the Sheriff is coming there to freeze your records.' " Sgt. Meyer testified in his deposition that he went to the one of the group homes on November 9 to investigate the rape and assault allegations. Although a warrant had not been issued, Sgt. Meyer told Fitzpatrick that he had orders to freeze their business records.[2] Meyer also told Fitzpatrick that Fitzpatrick need not lock up his business records but that the Fitzpatricks were not to have access to them. Meyer did not ask to see the records, nor did he segregate them or remove them from the premises. Meyer had no other contact with Fitzpatricks until November 20, 1990.

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[1] At his deposition, Mackey testified that he "suggested the records should be frozen." According to Sgt. Meyer, Mackey told him, " 'Advise Mr. Fitzpatrick that my people will be in his home tonight and his records are frozen.' "

[2] According to Sgt. Meyer, he stated, " '[Mackey] advised me to tell you that his people will be in your home tonight and that your records are frozen.' " Fitzpatrick testified that Meyer told him, " 'I'm a deputy sheriff and I have orders to freeze your records.' "

After Meyer left the residence, Cribett, who worked for Mackey, and Holbrook arrived at the home and demanded to see the records. Holbrook told Fitzpatrick that although the records were frozen to the Fitzpatricks, they were not frozen to Cribett or Holbrook. The two county officials reviewed the records for several hours and left the home with two boxes of the records for further investigation. Two days later, MRDD officials reviewed more records at the home and placed monitors in all of the Fitzpatrick group homes.

The Fitzpatricks made several phone calls to Mackey to determine how to get their records back. Subsequently, the Fitzpatricks received a letter from Mackey, who advised them that he had no power to freeze their records and that he had no objections to releasing the records to the Fitzpatricks. Sergeant Meyer also sent a letter to Fitzpatrick stating that he had determined that Mackey was not authorized to instruct Meyer to freeze the records, and, therefore, the records were not frozen.

The Fitzpatricks filed suit against Meyer, Mackey, Cribett, Holbrook, and several others, pursuant to 42 U.S.C. §§1983 and 1985, claiming that their Fourth, Fifth, and Fourteenth Amendment rights were violated, that they were denied due process of the law, and that defendants conspired to deprive them of their constitutional rights. The complaint also included state law claims. On September 18, 1992, Sgt. Meyer filed a motion for summary judgment, arguing, *inter alia*, that he was entitled to qualified immunity from suit in federal court. The district court granted Meyer's motion in part and denied it in part, but determined that Meyer was not entitled to judgment on the basis of qualified immunity. Cribett and Mackey also filed a motion for summary

judgment making the same arguments as Sgt. Meyer. The district court determined that Cribett was entitled to summary judgment but that Mackey was not immune from this lawsuit.

II.

Meyer argues that the district court erred when it denied him qualified immunity. First, Meyer argues that the Fitzpatricks failed to establish that a constitutional violation occurred. Second, he argues that any right violated was not "clearly established." Finally, he argues that Meyer acted reasonably in relying on Mackey's instructions to freeze the records. The Fitzpatricks respond that the court correctly determined that the seizure violated their Fourth Amendment rights and a reasonable officer should have known that Meyer's statements violated their rights. Mackey argues that the court erred when it concluded that his "suggestion" to Meyer to freeze the documents amounted to a constitutional violation. Mackey also argues that a reasonable official would not necessarily have known that his suggestion to Meyer was a violation of the Fitzpatricks' rights. The Fitzpatricks respond that Mackey was not entitled to qualified immunity because the decision to investigate was his idea and because the investigation was conducted at his direction.

Whether a defendant is entitled to qualified immunity is a question of law for the district court. *Poe v. Haydon*, 853 F.2d 418, 424 (6th Cir. 1988), *cert. denied*, 488 U.S. 1007 (1989). Because the issue of qualified immunity is a legal question, no deference is due the district court's conclusion. *Ramirez v. Webb*, 835 F.2d 1153, 1156 (6th Cir. 1987).

"[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The question whether an official is protected by qualified immunity does not turn on the subjective good faith of the defendant; rather, it turns on the "objective legal reasonableness" of his actions, assessed in light of the legal rules that were "clearly established" at the time the actions were taken. *Harlow*, 457 U.S. at 818-19. Because the qualified immunity inquiry "will turn on the circumstances with which the official is confronted, and often on the information that he possesses, the district court must consider all the undisputed evidence produced as a result of discovery, read in the light most favorable to the non-moving party." *Haydon*, 853 F.2d at 425.

To determine whether qualified immunity protects the defendants, this court must determine: 1) whether the Fitzpatricks identified a clearly established right alleged to have been violated; and 2) whether a reasonable state official in each of the defendants' positions should have known that his conduct was undertaken in violation of these rights. *See Johnson v. Estate of Laccheo*, 935 F.2d 109, 111 (6th Cir. 1991). Thus, we first must determine whether the Supreme Court decisions on search and seizure law provide "an authoritative, 'clearly established' rule forewarning defendants . . . on pain of personal liability." *Daugherty v. Campbell*, 935 F.2d 780, 784 (6th Cir. 1991) (citation omitted), *cert. denied*, 112 S. Ct. 939 (1992). Particular circumstances of the given case need not have been previously held illegal for the right to be "clearly

established"; but the right must, in a particularized sense, be clear enough to put a reasonable official on notice that his actions are illegal or unconstitutional. *See Marsh v. Arn*, 937 F.2d 1056, 1067 (6th Cir. 1991).

The parties agree that if there was a violation, it would be of the Fitzpatricks' Fourth Amendment rights to be free from an unreasonable seizure.

We conclude that the district court erred when it concluded that the Fitzpatricks' Fourth Amendment rights were violated when Meyer told them to consider their business records frozen. Meyer did nothing more than convey the message to the Fitzpatricks that they should consider their records frozen. Meyer did not ask to see, did not segregate, and did not physically seize the records. The Fitzpatricks cite no authority, and we know of none, holding that conveying a message that one's business records should be "frozen" is an act that constitutes a "seizure" under the Fourth Amendment. We conclude that Meyer's message to the Fitzpatricks is not a seizure under the Fourth Amendment.[3]

Because we have concluded that Meyer did not violate the Fitzpatricks' rights when he delivered Mackey's message to the Fitzpatricks, it follows that Mackey is also entitled to qualified immunity.[4]

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[3] Furthermore, even if Meyer's actions amounted to a seizure, it is not clear that the seizure was unreasonable under the Fourth Amendment given that the state already had access to the records as a result of state licensing requirements. *See Donovan v. Dewey*, 452 U.S. 594, 600 (1981). Thus, even if Meyer's actions constituted a Fourth Amendment violation, the violation was not so clearly established as to forewarn Meyer on pain of personal liability.

[4] Because we understand the district court's order as holding that the "seizure" occurred when Meyer conveyed the message, we do not address or resolve whether a seizure for which Mackey is responsible occurred later when Holbrook and Cribett searched and seized his records.

Furthermore, we need not address whether a reasonable state official in each of the defendants' positions should have known that his conduct was undertaken in violation of the Fitzpatricks' clearly established rights. *See Johnson*, 935 F.2d at 111.

III.

For these reasons we VACATE the orders denying Mackey and Meyer qualified immunity and REMAND with instructions to enter summary judgment for these defendants.

JUDGMENT OF THE UNITED STATES DISTRCT COURT, FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION

(Filed December 12, 1992)

C-1-92-11

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

GEORGE FITZPATRICK, *et al.*,

v.

SERGEANT LEE MEYER, *et al.*

JUDGMENT IN A CIVIL CASE

Decision by Court: This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

. . . that the motion of Defendants Theresa Holbrook and BCDHS for summary judgment on the basis of qualified immunity is hereby GRANTED to Defendant Holbrook as named in her individual capacity and is hereby DENIED as to Defendant BCDHS.

. . . that the motion of Defendants Holbrook and BCDHS for summary judgment on the Plaintiffs' substantive due process claim and on the basis of no actual damages is hereby DENIED.

. . . that the motion of Defendants Holbrook and BCDHS for summary judgment on the Plaintiffs' procedural due process claim under § 1983 and on the Plaintiffs' § 1985 conspiracy claim is hereby GRANTED.

. . . that the motion of Defendants Todd Cribett, Jack Mackey, and MRDD for summary judgment on the basis of qualified immunity is hereby GRANTED to Defendant Cribett as named in his individual capacity and is hereby DENIED as to Defendants Mackey and MRDD.

. . . that the motion of Defendants Cribett, Mackey, and MRDD for summary judgment on the Plaintiffs' substantive due process claim and on the basis of no actual damages is hereby DENIED.

. . . the motion of Defendants Cribett, Mackey, and MRDD for summary judgment on the Plaintiffs' procedural due process claim under § 1983 and on the Plaintiffs' § 1985 conspiracy claim is hereby GRANTED.

December 10, 1992

KENNETH MURPHY, *Clerk*
/s/ PAUL HENNESSEY, *Deputy Clerk*

ORDER OF THE UNITED STATES DISTRICT COURT, FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION

(Filed December 10, 1992)

C-1-92-11

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

GEORGE FITZPATRICK, *et al.*,
Plaintiff,

v.

SERGEANT LEE MEYER, *et al.*,
Defendant.

ORDER

This matter is before the Court upon the motion of Defendants Todd Cribett, Jack Mackey, and the Brown County Board of Mental Retardation (MRDD) for summary judgment (document 25). The Plaintiffs have filed a response incorporating by reference the arguments asserted in their memorandum in opposition to a motion for summary judgment previously filed by Defendants Sergeant Lee Meyer (Meyer) and the Brown County Sheriff. The Defendants incorporate by reference the factual assertions from the motion for summary judgment filed by Defendants Meyer and the Brown County Sheriff and the factual assertions contained in the Plaintiffs' response to that motion.

Factual Background

At the time of the operative events Plaintiffs George and Heza Fitzpatrick were operating, through the Fitzpatrick Group Home Partnership, three group homes for the mentally retarded in Williamsburg, Ohio.

On November 9, 1990, Jack Mackey, Superintendent of the Brown County Board of Mental Retardation and Developmental Disabilities (MRDD), spoke by telephone with Meyer regarding an alleged sexual assault upon a resident at one of the group homes.[7] During this conversation Mackey communicated to Meyer that the group home records should be frozen.[8] Soon thereafter, Meyer arrived at the Fitzpatrick Group Home to investigate. Mackey sent Cribett, an MRDD case manager, to the home to investigate the allegation. The Brown County Department of Human Services (BCDHS) sent Theresa Holbrook, a Social Services/Adult Protective Services Worker. Mackey requested Holbrook's presence because of her experience, relative to Cribett's, in investigating reports alleging sexual assault.

At the home Meyer spoke with George Fitzpatrick and, without a court order, froze the group home records. Meyer did not lock up the records or physically remove them from the premises. At about the time Meyer was leaving Holbrook and Cribett arrived. Holbrook and Cribett demanded to see the records. George Fitzpatrick

[7] Mackey also called the Brown County Department of Human Services, the State Department of Mental Retardation and Mental Disabilities, and George Fitzpatrick regarding the allegation. *Deposition of Jack Mackey* at 12.

[8] The parties dispute as to whether Mackey instructed Meyer to freeze the records or merely suggested this course of action.

* Printer's Note: Footnote numbers appear as in the original.

informed them that the records were frozen. Cribett responded that the records were frozen to Fitzpatrick's access but not to that of Holbrook or Cribett.

Holbrook and Cribett reviewed the records until late in the evening. Upon leaving the premises Holbrook and Cribett took two boxes of records, placing them in Cribett's car.[9] The balance of the records remained on the premises.

Thereafter, the Plaintiffs contacted the various agencies, offices and departments involved to determine the status of the records. Some of the records contained in the two boxes were returned to the Fitzpatricks. On November 20, 1990, Meyer and Mackey informed George Fitzpatrick that the records were no longer frozen.

The Plaintiffs filed the instant action alleging damages stemming from the Defendants freezing of the records in violation of the Fourth, Fifth and Fourteenth Amendments of the United States Constitution and 42 U.S.C. § 1983 and § 1985. The Plaintiffs also allege damages stemming from the Defendants alleged trespass and intentional interference with contractual business relations in the operation of the homes.

The Defendants seek summary judgment on the basis of qualified immunity, failure to exhaust state remedies, failure to establish actual damages, and that a conspiracy under § 1985(3) has not been established.

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[9] One box contained incident reports, *See Fitzpatrick v. Meyer*, No. 92-011 at 12-13 n. 5 (S.D. Ohio December 9, 1992) (order granting in part and denying in part summary judgment), and the other contained daily logs. *Plaintiffs' Memorandum in Opposition* at 4 (document 4).

Summary Judgment

Federal Rule of Civil Procedure 56(c) permits the Court to grant summary judgment as a matter of law only after the moving party has identified as the basis of its motion "the pleadings, depositions, answers to interrogatories, and admission on file, together with the affidavits, if any" which demonstrate the absence of any genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). A party opposing a properly supported motion for summary judgment "may not rest upon mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986) *quoting First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253 (1968).

The evidence of the nonmovant is to be believed and all justifiable inferences are to be drawn in his favor. *Anderson, supra* at 255 *citing, Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 158 (1970). The function of the Court is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. *Anderson, supra* at 249. There is no genuine issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. *Anderson* at 249 *citing Cities Service*, 391 U.S. at 288-289. If the evidence is merely colorable, *Dombrowski v. Eastland*, 387 U.S. 89 (1967) or is not significantly probative, *Cities Service, supra* at 290, summary judgment may be granted. *Anderson, supra* at 249-50.

Failure to Exhaust State Remedies

The Plaintiffs assert a substantive due process claim based upon an illegal seizure of property and a procedural due process claim based upon a deprivation of property without due process of law. *Complaint* at 7, ¶ 25.

Procedural Due Process

Summary judgment is granted to Defendants Cribett, Mackey and MRDD on the Plaintiffs' § 1983 procedural due process claim for the reasoning stated in this Court's prior order ruling upon a motion for summary judgment filed by Defendants Meyer and the Brown County Sheriff. *Fitzpatrick v. Meyer,* No. 92-011 at 8-10 (S.D. Ohio Oct. 13, 1992) (order granting in part and denying in part summary judgment).

Essentially, the Plaintiffs must plead and prove that "presumptively adequate [state] remedies are inadequate before a § 1983 claim can be maintained." *Macene v. MJW, Inc.,* 951 F.2d 700, 706 (6th Cir. 1991) (alteration added), because, from the record, the seizure and property deprivation they complain of was caused by random and unauthorized acts of state officials. *Watts v. Burkhart,* 854 F.2d 839, 843 (6th Cir. 1988); *Parratt v. Taylor,* 451 U.S. 527, 542-43 (1981). From the record, there is no genuine issue of material fact that the Plaintiffs have failed to plead and prove inadequate state remedies. The Plaintiffs § 1983 procedural due process claim is, therefore, not ripe. *Macene,* 951 F.2d at 703.

The Plaintiffs reiterate the argument they initially asserted in response to the summary judgment motion of Defendants Holbrook and BCDHS. That argument is, basically, pursuant to *Zinermon v. Burch,* 494 U.S. 113

(1990), because the state could have provided predeprivation procedural due process by asserting Ohio Revised Code § 5126.33, but failed to do so, the adequacy of post-deprivation due process need not be pleaded and proved, nor must post-deprivation due process be exhausted.[10] *Memorandum in Opposition to Summary Judgment* at 1-2 (document 31). The Plaintiffs' argument fails for the reasoning stated in this Court's order ruling upon the summary judgment motion of Defendants Holbrook and BCDHS. *Fitzpatrick v. Meyer*, No. 92-011 (S.D. Ohio December 9, 1992) (order granting in part and denying in part summary judgment). Essentially, that reasoning is because § 5126.33 is not applicable to seeking authorization to seize the records of a group home and because, unlike the situation in *Zinermon*, in the instant action it was not possible for the state to anticipate or predict the officials' alleged unauthorized actions and provide predeprivation due process (i.e. notice and a hearing), *Macene*, 951 F.2d at 706, to guard against the actions.

Substantive Due Process

Parratt is not applicable to two types of substantive due process claims:

> The first category encompasses claims based on a 'right, privilege, or immunity secured by the Constitution or federal laws other than the Due

[10] In *Zinermon*, a former state mental hospital patient brought a § 1983 claim for deprivation of liberty without due process against the hospital for admitting him under a voluntary program when it knew or should have known that he was incompetent and, therefore, subject only to an existing involuntary placement procedure. The Court held that unlike *Parratt*, the hospital's conduct could not be characterized as random and unauthorized because the state, due to the nature of mental illness, could foresee such a deprivation, therefore, implement predeprivation procedural due process safeguards. *Zinermon*, 494 U.S. at 138-39.

> Process Clause of the Fourteenth Amendment simpliciter.' The second category ... includes allegations of official acts which 'may not take place no matter what procedural protections accompany them.'

United of Omaha Life Ins. Co. v. Solomon, 960 F.2d 31, 35 (6th Cir. 1992) (quoting *Hayes v. Vessey*, 777 F.2d 1149, 1152 (6th Cir. 1985)) (citations omitted). This Court determined, in its prior order ruling upon a motion for summary judgment filed by Defendants Meyer and the Brown County Sheriffs that, from the facts, the Plaintiffs substantive due process claim falls within the second category and, therefore, that the *Parratt* ripeness requirements are not applicable. *Fitzpatrick v. Meyer*, No. 92-011 at 10 (S.D. Ohio Oct. 13, 1992) (order granting in part and denying in part summary judgment).

The Defendants, focusing only on the "temporary removal of a small portion of plaintiffs' records for the limited purpose of making copies pursuant to defendants' case management duties" argue that this conduct fails the test to be applied under the second category. *Reply Memorandum in Opposition* at 6 (document 35). The test of "whether the alleged conduct shocks the conscience of the court." *Solomon*, 960 F.2d at 35.

The portion of the Defendants' conduct which the Defendants point to, standing alone, appears innocuous. In total, however, the Defendants alleged conduct—an county agency official directing a deputy sheriff to seize the records of a home for mentally retarded adults after learning of a possible sexual assault upon one of the home's residents and then the deputy, upon arriving at the home to investigate, ordering the records seized absent a court order, warrant, or exception—shocks the conscience of this Court.

Conspiracy

Summary judgment is granted to Defendants Cribett, Mackey, and MRDD on the Plaintiffs' § 1985(3) claim for the reasoning stated in this Court's prior order ruling upon Defendants' Sergeant Lee Meyer and the Brown County Sheriff motion for summary judgment. *Fitzpatrick v. Meyer*, No. 92-011 at 10-11 (S.D. Ohio Oct. 13, 1992) (order granting in part and denying in part summary judgment). Specifically, the Plaintiffs have not asserted "that the alleged conspiracy was racial or otherwise motivated by a class base invidiously discriminatory animus," *United Brotherhood of Carpenters v. Scott*, 463 U.S. 825, 834 (1983), as is required. *Lesser v. Braniff Airways Inc.*, 518 F.2d 538, 543 (7th Cir. 1975); *Landrigan v. City of Warwick*, 628 F.2d 736, 739, n.1 (1st Cir. 1980); *Regan v. Sullivan*, 557 F.2d 300, 307 (2nd Cir. 1977); *Atkins v. Lanning*, 556 F.2d 485, 489 (10th Cir. 1977) (per curiam); *Bretz v. Kelman*, 773 F.2d 1026 (9th Cir. 1985) (en banc). *See also, Ohio Inns Inc. v. Nye*, 542 F.2d 673, 679 (6th Cir. 1976) (§ 1985(3) claim based upon a state action conspiracy dismissed for failure to allege racial or otherwise class-based discriminatory animus) and *Rice v. Ohio Dept. of Transp.*, 887 F.2d 716, 722 (6th Cir. 1989) (grant of summary judgment upheld on § 1985(3) claim for failure to allege racial or class-based discrimination) *vacated*, 110 S.Ct. 3232 (1990).

No Actual Damages

The Defendants argue that the

> Plaintiffs completely fail to establish that they have suffered any damages as a result of the alleged conduct of any of the defendants. Plaintiffs' causal link between the claimed actions of defendants and their claimed damages is frivolous. The lack of any

> causal link between the claimed due process deprivations and actual damages mandates a nominal damage award of One Dollar ($1.00) at best.

Motion for Summary Judgment at 7-8 (footnote omitted).

This Court notes that Fitzpatrick, "at his deposition, attested to significant losses of partnership revenue . . . [$44,000 for 1991 through the first half of 1992] attributed to Defendants' unlawful actions." *Memorandum in Opposition to Summary Judgment Motion of Meyer and the Brown County Sheriff* at 12. (alteration added). From the record, this Court determines that a genuine issue of material fact exists as to the Plaintiffs' alleged damages.

Qualified Immunity

Government officials performing discretionary functions are accorded qualified immunity from liability for civil damages provided that their actions "could reasonably have been thought consistent with the rights they are alleged to have violated." *Anderson v. Creighton*, 483 U.S. 635, 638 (1987); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). "Whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action, assessed light of the legal rules that were "clearly established" at the time [the action] was taken. *Anderson*, 483 U.S. at 639, *citing Harlow*, 457 U.S. 818, 819 (clarification added); *Johnson v. Estate of Laccheo*, 935 F.2d 109, 111 (6th Cir. 1991). The inquiry is "whether at the time the defendant acted the rights asserted were clearly established by decisions of the Supreme Court or the courts of this federal circuit." *Garvine v. Jackson*, 845 F.2d 647, 649 (6th Cir. 1988). A

right is clearly established if "[t]he contours of the right . . . [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson*, 483 U.S. at 640 (clarification added). If officials "of reasonable competence could disagree on this issue, immunity should be recognized." *Malley v. Briggs*, 475 U.S. 335, 341 (1986); *Guercio v. Brody*, 911 F.2d 1179, 1185 (6th Cir. 1990); *Dominque v. Telb*, 831 F.2d 673, 676 (6th Cir. 1987).

Qualified immunity insulates "government officials from liability only in their individual capacities and only for money damages. It has no effect on their liability in their official capacities since actions against parties in their official capacities are, essentially, actions against the entities for which the officers are agents." *Littlejohn v. Rose*, 768 F.2d 765, 772 (6th Cir. 1985), cert. denied, 475 U.S. 1045 (1986); *see Brandon v. Holt*, 469 U.S. 464 (1985); *Monell v. Department of Social Services*, 436 U.S. 658, 690 n.55 (1978).

Qualified immunity is a question of law to be decided by the court. *Poe v. Haydon*, 853 F.2d 418, 424 (6th Cir. 1988). The questions before this Court are 1) whether the Plaintiffs have alleged the violation of a clearly established right; and 2) whether reasonable officials in the position of the officials herein should have known that the conduct at issue was undertaken in violation of that right. *Estate of Laccheo*, 935 F.2d at 111, *citing*, *Brody*, 911 F.2d at 1184, and *Harlow*, 457 U.S. at 818.

In the context of a motion for summary judgment "[i]f there is 'a factual dispute (i.e., a genuine issue of material fact) involving the question on which immunity turns,' summary disposition is improper and the case must go to trial." *Heflin v. Stewart County, Tennessee*, 958 F.2d 709, 717 (6th Cir. 1992). A defendant is entitled

to summary judgment on qualified immunity grounds if he shows in light of clearly established principles that he could, as a matter of law, reasonably have believed that his actions were lawful. *Anderson*, 483 U.S. at 641; Fed. R. Civ. P. 56(c). "Since this inquiry will turn on the circumstances with which the official is confronted, and often on information that he possesses, the district court must consider all the undisputed evidence produced as a result of discovery, read in the light most favorable to the non-moving party." *Haydon*, 853 F.2d at 425.

The Defendants assert that qualified immunity is proper because "Cribett's actions and those of his superior Mackey and his employer MRDD did not violate clearly established statutory or constitutional rights which Defendant Cribett, as a reasonable person, would have known." The inspection of the records was within Cribett's discretionary authority as an investigator for MRDD. *Motion for Summary Judgment* at 4 (document 25). The Plaintiffs' response does not address the qualified immunity issue. *Memorandum in Opposition* (document 31).

The Defendants' argument confuses an inspection of records with an unreasonable seizure of records. As noted, the Plaintiffs claim damages from the Defendants alleged seizure of the records. The question of Cribett's and Mackey's qualified immunity, therefore, does not turn on the inspection of the records but rather the Plaintiffs' right to be free from an unreasonable seizure of the records.

A seizure of property "occurs when there is some meaningful interference with an individual's possessory interests in that property." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984); *United States v. Place*, 462 U.S. 695 (1983); *Texas v. Brown*, 460 U.S. 730, 747-748 (1983)

(Stevens, J., concurring in the judgment). The right to be free from unreasonable seizures is clearly established in the law. *Jacobsen*, 466 U.S. at 113.

There is no genuine issue of material fact that on November 9, 1990, Cribett arrived at the Fitzpatrick Home after Meyer had ordered the records seized and, moreover, that at least portions of the records remained seized until November 20, 1990, when Meyer and Mackey informed George Fitzpatrick that the records were no longer frozen. The alleged seizure which thereby deprived the Plaintiffs of access to the records had already occurred and was, toward the Plaintiffs, complete by the time Cribett arrived. Neither Cribett's inspection of the records or his participation in their removal to MRDD and BCDHS for copying alters when the alleged seizure occurred or enhances or detracts from the seizure or deprivation. Cribett's conduct did not result in nor contribute to a seizure of the records or a deprivation of access thereto because, toward the Plaintiffs, the alleged seizure and deprivation were already complete. At most, Cribett inspected, removed, and copied records which were already seized and to which the Plaintiffs were already fully deprived of access.

This Court grants qualified immunity to Cribett, as named in his individual capacity, because, regarding his conduct, the Plaintiffs have not alleged a violation of the clearly established right to be free from an unreasonable seizure. *Estate of Laccheo*, 935 F.2d at 111, *citing*, *Brody*, 911 F.2d at 1184, and *Harlow*, 457 U.S. at 818.

Concerning Mackey, this Court determines from the record that genuine issues of material fact exist as to whether Mackey directed Meyer to seize the records and whether Mackey directed Meyer to do so under the guise

of Mackey's authority.[11] Additionally, this Court determines that reasonable officials in the position of Mackey should have known that the conduct at issue was undertaken in violation of the right to be free from unreasonable seizures. This Court denies qualified immunity to Mackey as named in his individual capacity.[12]

CONCLUSION

The motion of Defendants Todd Cribett, Jack Mackey, and MRDD for summary judgment on the basis of qualified immunity is hereby GRANTED to Defendant Cribett as named in his individual capacity and is hereby DENIED as to Defendants Mackey and MRDD.

The motion of Defendants Cribett, Mackey, and MRDD for summary judgment on the Plaintiffs' substantive due process claim and on the basis of no actual damages is hereby DENIED.

The motion of Defendants Cribett, Mackey, and MRDD for summary judgment on the Plaintiffs' procedural due process claim under § 1983 and on the Plaintiffs' § 1985 conspiracy claim is hereby GRANTED.

IT IS SO ORDERED.

/s/ CARL B. RUBIN
United States District Judge

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[11] Mackey acknowledges in a letter to George Fitzpatrick dated November 20, 1990, that he is without authority to seize records. *Memorandum in Opposition*, Exhibit 2 (document 28).

[12] The Defendants also seek qualified immunity for MRDD. *Motion for Summary Judgment* at 3 (document 25). Because qualified immunity is available only to a defendant named in their individual capacity, *Littlejohn*, 768 F.2d at 772, this Court declines to accorded qualified immunity to MRDD which is not and cannot be so named. *Complaint* at 2.

JUDGMENT OF THE UNITED STATES DISTRICT COURT, FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION

(Filed October 13, 1992)

C-1-92-11

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

GEORGE FITZPATRICK, *et al.*,
Plaintiff,

v.

SERGEANT LEE MEYER, *et al.*,
Defendants.

JUDGMENT IN A CIVIL CASE

Decision by Court: This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED THAT

The motion of Defendants Meyer and the Brown County Sheriff for summary judgment on the basis of qualified immunity, on the Plaintiffs' substantive due process claim under § 1983 and for lack of damages and subject matter jurisdiction is hereby DENIED.

The motion of Defendants Meyer and the Brown County Sheriff for summary judgment on the Plaintiffs' procedural due process claim under § 1983 and on the Plaintiffs' § 1985 conspiracy claim is hereby GRANTED.

October 13, 1992

KENNETH MURPHY, *Clerk*
/s/ *PAUL HENNESSY*
Deputy Clerk

ORDER OF THE UNITED STATES DISTRICT COURT, FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION

(Filed October 13, 1992)

C-1-92-11

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

GEORGE FITZPATRICK, *et al.*,
Plaintiffs,

v.

SERGEANT LEE MEYER, *et al.*,
Defendants.

ORDER

This matter is before the Court upon the motion of Defendants Sergeant Lee Meyer and the Brown County Sheriff for summary judgment (document 19). The Plaintiffs have filed a response.

Factual Background

At the time of the operative events the Plaintiffs, George and Heza Fitzpatrick, were operating, through the Fitzpatrick Group Home Partnership, three group homes for the mentally retarded in Williamsburg, Ohio. On November 9, 1990, Sergeant Lee Meyer (Meyer) of the Brown County Sheriff's Department arrived at one of the homes to investigate an alleged sexual assault upon

one of the home's residents. At the home, Meyer spoke with George Fitzpatrick and, without a court order, froze the group home records. Meyer did not lock up the records or physically remove them from the premises.

At about the time Meyer was leaving Theresa Holbrook of the Brown County Human Services Department (BCHSD) and Todd Cribett of the Brown County Board of Mental Retardation and Developmental Disabilities (MRDD) arrived. Holbrook and Cribett demanded to see the records. George Fitzpatrick informed them that the records were frozen. Cribett responded that the records were frozen to Fitzpatrick's access but not to that of Holbrook or Cribett.

Holbrook and Cribett reviewed the records until late in the evening. Upon leaving the premises, Holbrook and Cribett took two boxes of records. The balance of the records remained on the premises.

Thereafter, the Fitzpatricks contacted the various agencies, offices and departments involved to determine the status of the records. Some of the records contained in the two boxes were returned to the Fitzpatricks. On November 20, 1990, Meyer informed George Fitzpatrick that the records were no longer frozen.

The Fitzpatricks filed the instant action alleging damages stemming from the Defendants freezing of the records in violation of the Fourth, Fifth and Fourteenth Amendments of the United States Constitution and 42 U.S.C. § 1983 and § 1985. The Fitzpatricks also allege damages stemming from the Defendants alleged trespass and intentional interference with contractual business relations in the operation of the homes.

Summary Judgment

Federal Rule of Civil Procedure 56(c) permits the Court to grant summary judgment as a matter of law only after the moving party has identified as the basis of its motion "the pleadings, depositions, answers to interrogatories, and admission on file, together with the affidavits, if any" which demonstrate the absence of any genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). A party opposing a properly supported motion for summary judgment "may not rest upon mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby,* 477 U.S. 242, 248 (1986) *quoting, First National Bank of Arizona v. Cities Service Co.,* 391 U.S. 253 (1968).

The evidence of the nonmovant is to be believed and all justifiable inferences are to be drawn in his favor. *Anderson, supra* at 255 *citing, Adickes v. S. H. Kress & Co.,* 398 U.S. 144, 158 (1970). The function of the Court is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. *Anderson, supra* at 249. There is no genuine issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. *Anderson* at 249 *citing Cities Service,* 391 U.S. at 288-289. If the evidence is merely colorable, *Dombrowski v. Eastland,* 387 U.S. 89 (1967) or is not significantly probative, *Cities Sevice, supra* at 290, summary judgment may be granted. *Anderson, supra* at 249-50.

Qualified Immunity

Government officials performing discretionary functions are accorded qualified immunity from liability for civil damages provided that their actions "could reasonably have been thought consistent with the rights they are alleged to have violated." *Anderson v. Creighton*, 483 U.S. 635, 638 (1987); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). "Whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action, assessed light of the legal rules that were "clearly established" at the time [the action] was taken. *Anderson*, 483 U.S. at 639, *citing*, *Harlow*, 457 U.S. at 818, 819 (clarification added); *Johnson v. Estate of Laccheo*, 935 F.2d 109, 111 (6th Cir. 1991). The inquiry is "whether at the time the defendant acted the rights asserted were clearly established by decisions of the Supreme Court or the courts of this federal circuit." *Garvine v. Jackson*, 845 F.2d 647, 649 (6th Cir. 1988). A right is clearly established if "[t]he contours of the right . . . [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson*, 483 U.S. at 640 (clarification added). If officials "of reasonable competence could disagree on this issue, immunity should be recognized." *Malley v. Briggs*, 475 U.S. 335, 341 (1986); *Guercio v. Brody*, 911 F.2d 1179, 1185 (6th Cir. 1990); *Dominque v. Telb*, 831 F.2d 673, 676 (6th Cir. 1987).

Qualified immunity insulates "government officials from liability only in their individual capacities and only for money damages. It has no effect on their liability in their official capacities since actions against parties in their official capacities are, essentially, actions against

the entities for which the officiers are agents." *Littlejohn v. Rose,* 768 F.2d 765, 772 (6th Cir. 1985), cert. denied, 475 U.S. 1045 (1986); *see Brandon v. Holt,* 469 U.S. 464 (1985); *Monell v. Department of Social Services,* 436 U.S. 658, 690 n.55 (1978).

Qualified immunity is a question of law to be decided by the court. *Poe v. Haydon,* 853 F.2d 418, 424 (6th Cir. 1988). The questions before this Court are 1) whether the Plaintiffs have alleged the violation of a clearly established right, and 2) whether reasonable officials in the position of the officials herein should have known that the conduct at issue was undertaken in violation of that right. *Estate of Laccheo,* 935 F.2d at 111, *citing, Brody,* 911 F.2d at 1184, and *Harlow,* 457 U.S. at 818.

In the context of a motion for summary judgment "[i]f there is 'a factual dispute (i.e., a genuine issue of material fact) involving the question on which immunity turns,' summary disposition is improper and the case must go to trial." *Heflin v. Stewart County, Tennessee,* 958 F.2d 709, 717 (6th Cir. 1992). A defendant is entitled to summary judgment on qualified immunity grounds if he shows in light of clearly established principles that he could, as a matter of law, reasonably have believed that his actions were lawful. *Anderson,* 483 U.S. at 641; Fed. R. Civ. P. 56(c). "Since this inquiry will turn on the circumstances with which the official is confronted, and often on information that he possesses, the district court must consider all the undisputed evidence produced as a result of discovery, read in the light most favorable to the non-moving party." *Haydon,* 853 F.2d at 425.

The Defendants assert that

> [t]he only act attributable to Meyer and/or the Brown County Sheriff is Meyer's statement to Fitzpatrick on November 9, 1990 that his

> (Fitzpatrick's) records were frozen. By Fitzpatrick's own admission, neither Meyer nor anyone associated with the Brown County Sheriff's Department ever removed a single document from the Fitzpatrick's premises. In fact, Meyer and the Brown County Sheriff's Department had no further involvement with the freezing of the records after November 9, 1990. This set of facts demonstrates Meyer and the Brown County Sheriff are entitled to qualified immunity.

Motion for Summary Judgment at 6. "The single act of Meyer telling Fitzpatrick his records were frozen accompanied by no further action either at the hands of Meyer and/or the Brown County Sheriff's Department cannot be deemed a violation of any Constitutional right. The statement attributed to Meyer cannot be said to have violated a 'clearly established right' of Fitzpatrick." *Id.* at 7.

The Plaintiffs, referencing George Fitzpatrick's deposition, assert that Meyer and Fitzpatrick discussed the frozen records on the telephone between November 9, and November 20, 1990. The Plaintiffs assert that Fitzpatrick learned from a telephone conversation with Meyer on November 20, 1990, that the records were no longer frozen. *Memorandum in Opposition* at 1-2, 5. The Plaintiffs contend that freezing the records, even for a short period of time, constitutes a seizure pursuant to the Fourth Amendment because this is a " 'meaningful interference with an individual's possessory interest.' " *Id.* at 6 *citing, United States v. Jacobson,* 466 U.S. 109, 113 (1984). Moreover, the Plaintiffs contend that freezing the records absent a proper warrant or exception, as in the instant case, violates rights clearly established by the Fourth Amendment. *Memorandum in Opposition* at 7-8.

The right to be free from unreasonable seizures is clearly established in the law. *Jacobson*, 466 U.S. at 113. Upon consideration of the record in a light most favorable to Meyer this Court determines that, as a matter of law, a reasonable officer in the position of Meyer could not have reasonably believed that freezing the records would not violate the right to be free from unreasonable seizures. Qualified immunity is not accorded Meyer as named in his individual capacity.[1]

Failure to Exhaust State Remedies

The Plaintiffs assert a substantive due process claim based upon an illegal seizure of property and a procedural due process claim based upon a deprivation of property without due process of law. *Complaint* at 7, ¶ 25; *Memorandum in Opposition* at 5-8.

The Defendants contend that summary judgment is proper concerning the Plaintiffs' § 1983 claim for deprivation of procedural due process because the "Fitzpatricks have failed to exhaust adequate State remedies [or] assert . . . that the State remedies available to them are inadequate." *Motion for Summary Judgment* at 8. (clarification added). The Plaintiffs counter that their "due process claim involves the deprivation of substantive due process," a seizure of Plaintiffs property in violation of the Fourth Amendment, and therefore an exhaustion of state remedies is not required. *Plaintiff's Memorandum in Opposition* at 8-9.

[1] The Defendants also seek qualified immunity for the Defendant named as "the Brown County Sheriff." *Motion for Summary Judgment* at 7; *Complaint* at 2. Based upon the pleadings this Court assumes, without deciding, that this Defendant is actually the Brown County Sheriff's Department. Because qualified immunity is available only to a defendant named in an individual capacity, *Littlejohn*, 768 F.2d at 772, this Court declines to accorded qualified immunity to the "Brown County Sheriff," who has not been named in an individual capacity, or to the Brown County Sheriff Department which cannot be so named.

Procedural Due Process

Exhaustion of state remedies is not a prerequisite to the bringing of a § 1983 action in federal court. Proving the inadequacy of state remedies is a species of the ripeness doctrine. *Macene v. MJW, Inc.*, 951 F.2d 700, 703 (6th Cir. 1991) *citing, Patsy v. Board of Regents*, 457 U.S. 496 (1982).

In *Parratt v. Taylor*, 451 U.S. 527 (1981), the Supreme Court held that the negligent deprivation of property does not violate due process if adequate state remedies are available to address the wrong. Emphasizing the "important difference between a challenge to an established state procedure as lacking in due process and a property damage claim arising out of the misconduct of state officers," *Parratt*, 451 U.S. at 542, the Court stated that "in the latter situation . . . the state action is not necessarily complete." *Id.* "There is no contention that the procedures themselves are inadequate nor is there any contention that it was practicable for the State to provide a predeprivation hearing." *Id.* at 543.

Whether or not a plaintiff must plead and prove inadequate state remedies depends on whether the case falls within the scope of *Parratt* and its progeny. *Macene*, 951 F.2d at 705. *Parratt* is "inapplicable where a deprivation of property is caused by conduct pursuant to an established state procedure, rather than random unauthorized conduct." *Watts v. Burkhart*, 854 F.2d 839, 843 (6th Cir. 1988). (citations omitted). In the Sixth Circuit it is well established that

> a § 1983 plaintiff may prevail on a procedural due process claim by either (1) demonstrating that he is deprived of property as a result of established state procedure that itself violates due process rights; or

> (2) by proving that the defendants deprived him of property pursuant to a 'random and unauthorized act' and that available state remedies would not adequately compensate for the loss. *Parratt* is applied to those cases falling under the second category.
>
> In *Parratt* cases, then, the facts are such that pre-deprivation remedies are impossible and adequate post-deprivation remedies are all that is required by due process. If the state provides post-deprivation remedies, and if due process given the particular wrong alleged requires only post-deprivation remedies, then federal courts will require proof that those presumptively adequate remedies are inadequate before a § 1983 claim can be maintained. Such a claim is not "ripe" for consideration by a federal court because the state action at issue is not complete. If the state procedures adequately cure any alleged deprivation of property then due process has not been violated. The inadequacy of a state remedies generally cannot be proven unless those remedies are exhausted.

Macene, 951 F.2d at 706. (citations omitted).

The Plaintiffs do not allege that Fitzpatrick was deprived of his property as a result of an established state procedure that itself violates due process rights. Rather, from the facts, any deprivation resulted from the actions of Meyer and the Brown County Sheriff. Necessarily then, the Plaintiffs must plead and prove that available state remedies are inadequate to compensate for their loss. There is no genuine issue of material fact that the Plaintiffs have failed to do so. The Plaintiffs' procedural due process claim is, therefore, as a matter of law, not ripe for consideration by this Court.

Substantive Due Process

The Plaintiffs argue that Meyer's actions amount to a substantive due process violation to which *Parratt* does not apply. *Parratt* is not applicable to two types of substantive due process claims:

> The first category encompasses claims based on a 'right, privilege, or immunity secured by the Constitution or federal laws other than the Due Process Clause of the Fourteenth Amendment simpliciter.' The second category ... includes allegations of official acts which 'may not take place no matter what procedural protections accompany them.'

United of Omaha Life Ins. Co. v. Solomon, 960 F.2d 31, 35 (6th Cir. 1992) *quoting, Hayes v. Vessey*, 777 F.2d 1149, 1152 (6th Cir. 1985) (citations omitted).

From the facts, the Plaintiffs substantive due process claim falls within the second category. As such, the *Parratt* ripeness requirements are not applicable.

Conspiracy

The Defendants assert that summary judgment should be granted on the § 1985 claim because the Plaintiffs have not asserted "that the alleged conspiracy was racial or otherwise motivated by a class base invidiously discriminatory animus." *Motion for Summary Judgment* at 10, *citing, United Brotherhood of Carpenters v. Scott*, 463 U.S. 825, 834 (1983).

The Plaintiffs counter that the Defendants should have made this argument within the context of Federal Rule of Civil Procedure 12(b)(6) at an earlier stage in these proceeding. Moreover, citing *Seltzer v. Berkowitz*, 459 F.Supp. 347, 352 (E.D.N.Y. 1978), the Plaintiffs contend that "the class-based discriminatory

requirement discussed by the United States Supreme Court in 42 U.S.C. § 1985 only applies to private conspiracies. Because Plaintiffs do allege the element of state action . . . [they] were not required to allege class-based discriminatory animus to sufficiently state a cause of action under 42 U.S.C. § 1985." *Plaintiff's Memorandum in Opposition* at 10-11. (clarification added).[2]

This Court agrees with the majority of circuit courts which have considered the question in rejecting the *Seltzer* reasoning and in requiring racial or class-based invidious discrimination in a state action based conspiracy. *Lesser v. Braniff Airways Inc.*, 518 F.2d 538, 543 (7th Cir. 1975); *Landrigan v. City of Warwick*, 628 F.2d 736, 739, n.1 (1st Cir. 1980); *Regan v. Sullivan*, 557 F.2d 300, 307 (2nd Cir. 1977); *Atkins v. Lanning*, 556 F.2d 485, 489 (10th Cir. 1977) (per curiam); *Bretz v. Kelman*, 773 F.2d 1026 (9th Cir. 1985) (en banc). *See also, Ohio Inns Inc. v. Nye*, 542 F.2d 673, 679 (6th Cir. 1976) (§ 1985(3) claim based upon a state action conspiracy dismissed for failure to allege racial or otherwise class-

---

[2] Section 1985 outlaws "five broad classes of conspiratorial activity." *Kush v. Rutledge*, 460 U.S. 719, 724 (1983). The Plaintiffs do not assert under which paragraph of § 1985 they are proceeding. The facts, however, describe a claim under the first part of § 1985(3) which provides a cause of action against two or more persons who

> "conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws."

The facts do not describe a claim which relates to the "institutions and processes of the Federal Government"—§ 1985(1); federal officers, the first part of § 1985(2); federal judicial proceedings, or second part of § 1985(3); federal elections, nor do the facts describe an action under the second part of § 1985(2); state court proceedings. *Kush*, 460 U.S. at 724-25.

based discriminatory animus) and *Rice v. Ohio Dept. of Transp.*, 887 F.2d 716, 722 (6th Cir. 1989) (grant of summary judgment upheld on § 1985(3) claim for failure to allege racial or otherwise class-based discriminatory animus).

No Damages or Federal Subject Matter Jurisdiction

The Defendants argue that "Meyer did nothing more than tell Fitzpatrick his records were frozen . . . other individuals unrelated to the Sheriff's Department actually reviewed . . . and took some of the records. . . . An agency from the State of Ohio initiated a receivership action against Fitzpatrick. There is no evidence that a single act of Meyer caused any damage to plaintiff. For these reasons, Fitzpatrick's claims must be dismissed as to these defendants." *Motion for Summary Judgment* at 10-11.

The Plaintiffs counter that "[t]his argument is contrary to the longstanding principle that a party subject to a deprivation of a constitutional right suffers irreparable harm regardless of the extent of financial damage incurred." *Memorandum in Opposition* at 11. Additionally, the Plaintiffs contend that Fitzpatrick, "at his deposition, attested to significant losses of partnership revenue . . . [$44,000 for 1991 through the first half of 1992] attributed to Defendants' unlawful actions. *Id.* at 12. (clarification added). From the record, this Court determines that a genuine issue of material fact exists as to the Plaintiffs' alleged damages.

Finally, the Defendants assert that the Plaintiffs' trespass and contractual interference claims are state law claims and "[s]ince Fitzpatrick has no federal claim against these defendants, their state law claims against

these defendants must also be dismissed." *Motion for Summary Judgment* at 11. (citation omitted). The Plaintiffs contend that they have asserted cognizable federal claims and, as a result, that this Court has subject matter jurisdiction over the connected state law claims. *Memorandum in Opposition* at 13.

The Plaintiffs § 1983 claim is properly before this Court. This Court exercises supplemental jurisdiction over the Plaintiffs' claims for intentional interference with contractual relations and trespass. 28 U.S.C. § 1367.

CONCLUSION

The motion of Defendants Meyer and the Brown County Sheriff for summary judgment on the basis of qualified immunity, on the Plaintiffs' substantive due process claim under § 1983 and for lack of damages and subject matter jurisdiction is hereby DENIED.

The motion of Defendants Meyer and the Brown County Sheriff for summary judgment on the Plaintiffs' procedural due process claim under § 1983 and on the Plaintiffs' § 1985 conspiracy claim is hereby GRANTED.

IT IS SO ORDERED.

/s/ CARL B. RUBIN
United States District Judge

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DENYING PETITION FOR REHEARING

(Filed November 5, 1993)

No. 92-4159/93-3033

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GEORGE FITZPATRICK; HEZA FITZPATRICK,
Plaintiffs-Appellees,

v.

LEE MEYER, SGT.; BROWN COUNTY SHERIFF,
Defendants-Appellants (92-4159),
Defendants (93-3033),

TODD CRIBETT, *et al.*,
Defendants (92-4159),
Defendants-Appellants (93-3033).

ORDER

BEFORE: MILBURN, RYAN, and BATCHELDER, *Circuit Judges.*

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ LEONARD GREEN
Leonard Green, *Clerk*

Supreme Court, U.S.
FILED
FEB 22 1994
OFFICE OF THE CLERK

No. 93-1244

In The

Supreme Court of the United States

October Term, 1993

GEORGE FITZPATRICK and HEZA FITZPATRICK,

Petitioners,

vs.

JACK MACKEY and SGT. LEE MEYER,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

The Petitioners operated three group homes for the mentally retarded. They received their license to operate these homes from the State of Ohio. Inspection procedures and record keeping requirements were promulgated by the State. The State also retained the right to review any and all records maintained by the Petitioners. (G. Fitzpatrick Deposition at 18, 20).

Jack Mackey (Mackey) was the superintendent of the Brown County Board of Mental Retardation and Developmental Disabilities (MRDD). (J. Mackey Deposition at 5). The responsibility of MRDD with respect to group homes within the county was to monitor the delivery of services to mentally retarded clients through its case management service. The case manager was to visit the homes, make observations on the quality of services and in the event of abuse or neglect of a client to report the incident to the proper authority. The proper authority would be Mackey as Superintendent of the local Board, the Ohio Department of Mental Retardation and Developmental Disabilities and, in serious cases of abuse, the county Sheriff's Department. (J. Mackey Deposition at 6-7).

On November 9, 1990, Mackey received a report of a rape of a mentally retarded client at one of the Petitioners' homes, and, on the same date, called the State Department of Mental Retardation and Developmental Disabilities, the Sheriff's Department, the County Human Services Department and the Petitioner, George Fitzpatrick, concerning the report. (Mackey Deposition at 9-12).

Mackey immediately began to inquire into the incident by questioning the alleged victim and other residents of the group home and by having the alleged victim examined at a hospital. (J. Mackey Deposition at 12).

Mackey reported by phone to the Brown County Sheriff that a rape had been reported by a client, that the client was being examined at the hospital and he requested the assistance of the Sheriff in the investigation. (J. Mackey Deposition at 18-19). Mackey spoke by phone with Sgt. Lee Meyer (Meyer) of the Sheriff's Office and suggested to Meyer that the group home records should be frozen and that Meyer communicate that to Mr. Fitzpatrick. (J. Mackey Deposition at 19-20).

Mackey was aware that Meyer was going to the group home to question employees as part of his investigation of the alleged rape and Mackey suggested, "While you are out there you should probably tell him his records are frozen." (Mackey Deposition at 40). In Mackey's mind it was a request to the sheriff, he knew he could not direct the sheriff to do anything. (J. Mackey Deposition at 55).

In suggesting to Meyer that the records be frozen, it was Mackey's purpose that the group home records maintain their integrity, free of tampering so that in any subsequent investigation nothing would be in the records that would alter any of the facts on the reality of the situation. Mackey felt that this would be in everyone's best interest, including the Fitzpatricks'. (J. Mackey Deposition at 19-20 and 62). Mackey also suggested to Fitzpatrick in a phone conversation on November 9th that

Fitzpatrick initiate his own investigation. (J. Mackey Deposition at 21).

Meyer responded to the Fitzpatrick group home on the afternoon of November 9, 1990 to investigate the reported incident. (G. Fitzpatrick Deposition at 62, 66). Meyer took a statement from Mike Lyons, Fitzpatrick's son-in-law, who, at the time, had been identified in the criminal complaint. (G. Fitzpatrick Deposition at 11, 66). While at the group home, Meyer told Fitzpatrick that he [Meyer] had orders to freeze Fitzpatrick's records. (G. Fitzpatrick Deposition at 65).

As Meyer was leaving, Teresa Holbrook, a case worker with the Brown County Department of Human Services and Todd Cribett, a case manager with Brown County MRDD, arrived at the home and asked to see Fitzpatrick's records. Both Holbrook and Cribett were at the home for the purpose of conducting an investigation concerning the rape allegation and other allegations of neglect and abuse.

Pursuant to the case management responsibilities of the MRDD, Holbrook and Cribett reviewed Petitioners' records until approximately midnight, when a decision was made to remove two boxes of records from the premises. (G. Fitzpatrick Deposition at 79-81). The records reviewed and the records removed were all subject to inspection and review by MRDD and the Department of Human Services. (G. Fitzpatrick Deposition at 218-219).

Within approximately two days, the State Department of MRDD arrived at the home to review records and place monitors in all the Fitzpatrick homes on a round-

the-clock basis seven days a week. (G. Fitzpatrick Deposition at 91, 92). Fitzpatrick understood the State's involvement stemmed from the accusations of rape and abuse. (Fitzpatrick Deposition at 93). A portion of the records were returned to the Fitzpatricks within a few days of November 9 and another portion were returned on November 19th or 20th. (G. Fitzpatrick Deposition at 94, 95).

The United States District Court for the Southern District of Ohio, Western Division, denied in part Mackey's Motion for Summary Judgment finding that genuine issues of material fact existed regarding the issue of qualified immunity. The United States Court of Appeals for the Sixth Circuit reversed, concluding that the lower court erred in finding that Petitioners' Fourth Amendment rights were violated when Meyer told them to consider their business records frozen. The Court observed that there was no authority holding that conveying a message that one's business records should be "frozen" is an act constituting a "seizure" under the Fourth Amendment.

Because the Court concluded that Meyer did not violate Petitioners' rights when he delivered Mackey's message to the Fitzpatricks, it followed that Mackey was also entitled to qualified immunity.

SUMMARY OF ARGUMENT

Petitioners seek review by this Honorable Court, via a Writ of Certiorari, of the holding by the Sixth Circuit

that Respondent Mackey is entitled to qualified immunity.

Petitioners, in order to establish the existence of a clearly established right violated by Mackey, seek to have the Court define and refine the standards regarding the unreasonable seizure of property so that this Respondent is found to have violated the standard. Only by way of such an ex post facto legal development can the right become clearly established. However, the prior decisions of this Court require that the right be clearly established at the time of the alleged violation not at some later point in time as a result of subsequent legal developments.

ARGUMENT

> Because there exists no authority holding that the conveying to another of a message that their records are frozen is an act which constitutes a seizure under the Fourth Amendment, Petitioners have failed to identify a clearly established right alleged to have been violated and therefore this Respondent is entitled to qualified immunity.

This Court, in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) defined the parameters of qualified immunity:

> We therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

> Reliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law, should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment. On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred. If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful. Until this threshold immunity question is resolved, discovery should not be allowed. If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct.

Id. at 818-819. (citations and footnotes omitted).

In *Anderson v. Creighton*, 483 U.S. 635 (1987), this Court provided guidance as to the meaning of "clearly established law". The *Anderson* court recognized that if "clearly established law" is applied in a general sense, it then bears no relationship to the "objective legal reasonableness" which, in part, determines an officer's entitlement to qualified immunity. Rather, the Court explained the concept of "clearly established" as:

> The contours of the right must be sufficiently clear that a reasonable officer would understand that what he is doing violated that right. This is not to say that an official action is protected by qualified immunity unless the very action in

> question has previously been held unlawful, but it is to say that in the light of pre-existing law, the unlawfulness must be apparent. *Id.* at 640. (citations omitted)

Accordingly, to determine whether a defendant is protected by qualified immunity, the Court must determine first whether petitioners have identified a clearly established right alleged to have been violated, whether the decisions of this Court on search and seizure provide an authoritative, "clearly established" rule which would have forewarned the Respondents Meyer and Mackey that their conduct was in violation of that right. Where an official's duties legitimately require action in which clearly established rights are not implicated, the public interest is better served by action taken with independence and without fear of consequences. *Harlow*, supra at 819.

The Sixth Circuit properly concluded that since there existed no authority establishing that the conveying of a message that one's business records are "frozen" constitutes a "seizure" there existed no clearly established right. Since the law was not clearly established the Respondents could not "know" that the law forbade their conduct.

The Petitioners implicitly recognize the absence of a clearly established right. They argue that a ruling by this Court that the freezing of records constituted a Fourth Amendment violation would "dispel a dark cloud of uncertainty", Petition at 11. If the situation is such how can it be argued that the right is clearly established?

Petitioners contend that this case presents "an appropriate avenue for this Court to define and refine the standards of unreasonable seizure of property in violation of the Fourth Amendment". Petition at 20. In this way, it is argued, lower tribunals will receive needed guidance in determining whether to condemn the actions of government officials. If the standards of unreasonable seizure of property need further definition and refinement and if lower courts are in need of guidance then obviously the law is not clearly established. If definition and refinement are necessary, this case is not the proper vehicle. The issue here is whether Petitioners identified a clearly established right alleged to have been violated not whether the right needs further explication.

Petitioners have failed to demonstrate the existence of any of the considerations governing review on writ of certiorari and have failed to demonstrate any special or important reasons therefore.

CONCLUSION

The petition for a writ of certiorari must therefore be denied as Petitioners have presented no issue for review by this Court nor the existence of a constitutional issue.

Respectfully submitted;

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(3)

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93-1244

NO. 93-124

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

GEORGE FITZPATRICK and HEZA FITZPATRICK,
Petitioners,

vs.

JACK MACKEY and SGT. LEE MEYER,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the act of a deputy sheriff in conveying to an operator of group homes for the mentally retarded a message from the superintendent of the Department of Mental Retardation that the operators' records were frozen, constituted an unreasonable seizure in violation of the fourth amendment of the United States Constitution.

LIST OF PARTIES

The parties to this proceeding are Petitioners, George Fitzpatrick and Heza Fitzpatrick, and Respondents, Sgt. Lee Meyer and Jack Mackey.

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Respondent, Sgt. Lee Meyer, respectfully prays that the Petition for Writ of Certiorari filed herein by the Petitioners, George Fitzpatrick and Heza Fitzpatrick be denied.

OPINIONS BELOW

Respondent Meyer agrees that the opinions below are as stated by Petitioner and as contained in the Appendix to the Petition.

JURISDICTION

The Respondent Meyer agrees with Petitioner's jurisdictional statement.

STATEMENT OF THE CASE

Petitioners correctly state the procedural posture of this litigation except for their statement that "...the United States Court of Appeals for the Sixth Circuit agreed with the standard which the District Court used to define qualified immunity." Inasmuch as the District Court found a Fourth Amendment violation when, in fact, there had been no seizure, it must be concluded that the standard was misapplied by the District Court.

Their statement of the underlying facts, although not actually erroneous, paints an inaccurate picture as a result of misplaced emphasis and attempt at dramatization.

There are two pivotal events in the factual backround upon which the issues herein focus. The first is a telephone conversation between Respondent Mackey and Respondent Meyer immediately before the latter went to the Petitioners' premises to investigate the abuse complaint. The statement made to Respondent Meyer by Respondent Mackey was, "Advise Mr. Fitzpatrick that my people will be in his home tonight and his records are frozen."

The second event was the conveyance of that message to the Petitioner, Mr. Fitzpatrick, by Respondent Meyer.

These events must be viewed in the light of two particularly significant facts. First, the State of Ohio, in licensing the operation of the group homes by Petitioners, retained the right to review Petitioners' records. Second, and most significatly, Respondent Meyer did not, at any time, take possession of, examine or even see Petitioners' records.

REASONS FOR DENYING THE WRIT

Although often repeated and variously stated, the only reason for granting certiori advanced by Petitioners is their contention that the Court should take this opportunity to redefine "seizure".

In response, two points need to be made. This Court has quite clearly defined "seizure" a number of times, and this case presents a most improbable factual basis for defining "seizure". This Court has defined "seizure" in United States v.Jacobsen, (1984) 466 U.S. 109, 80 L. Ed.2d 85, 104 S. Ct. 1652; Florida v. Bostick, (1991) 501 U.S. ___, 115 L. Ed.2d 389, 111 S. Ct. 2382, United States v. Place, (1983) 462 U.S. 696, 77 L. Ed. 2d 110, 103 S Ct 2637; Soldat v. Cook County, (1992) ___U.S.___, 121 L. Ed.2d 450 113 S.

Ct. 538 and Coolidge v. New Hampshire, (1971) 403 U.s. 443, 29 L. Ed.2d 564, 91 S. Ct. 2022

In Jacobsen a white powdery substance found by baggage handlers on a damaged package was taken by federal agents, tested and found to be cocaine. This Court, in reversing the circuit court, found no Fourth Amendment violation. In Bostick this Court found that a police officer's request to search luggage did not constitute a seizure. The holding in Place was that a temporary detention of luggage for exposure to trained narcotic detention dog was not a seizure but that a 90 minute detention was unreasonable. The participation of police officers in an eviction from and removal of a mobile home was found to violate Fourth Amendment rights in Soldat. In Coolidge a wife's

voluntary delivery of her husband's guns and clothing to police officers did not, in this Court's opinion, involve a seizure.

It would be difficult to imagine a set of facts so ill-suited as an exemplar in the defining of "seizure" as are the facts of the present case. The limit of Respondent Meyer's participation was the delivery of Respondent Mackey's message that Petitioner's records were frozen. In delivering the message he made it clear that it was, in fact, a message. He issued no orders. He gave no instructions. He did not segregate, examine or even see the records,much less do anything to affect their possession or location.

If the Court were to reveiw this case it would be only to state the obvious conclusion already reached by the circuit court - that the conduct of Respondent Meyer did not constitute a seizure; that there was no Fourth Amendment violation and that Respondent Meyer has the benefit of a qualified immunity.

It is respectfully submitted that the petition in this case amounts to nothing more than a request that this Court extend the definition of "seizure" into the area of fiction and cause it to lose any practical meaning.

CONCLUSION

Because this Court has defined "seizure" as used in the Fourth Amendment and because the Court of Appeals for the Sixth Circuit has followed that definition in finding that there was no seizure in the present case, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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